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BANKRUPTCY—RESTORATION OF EMBEZZLED TRUST-FUND AS A VOIDABLE PREFERENCE.—In Clarke v. Rogers, 183 Fed. 518, the Circuit Court of Appeals of the First Circuit recently held that the restitution to the trust fund of substituted securities by the defaulting trustee may constitute a preference voidable upon his subsequent bankruptcy, that a bankrupt may in his individual capacity have preferred himself in his trustee capacity, and, inferentially, that a defaulting trustee is debtor to the trust.[1] The same facts had never concurred in an American case. A long line of English decisions reach an opposite conclusion from this case. This variance is partly accounted for in the difference in construction under the bankrupt acts. In England a transfer in order to be a voidable preference must be clearly voluntary and with the intent to prefer as the dominant motive on the part of the transferror.[2] So English courts have refused to avoid a preference where they have found it was made not with intent to prefer but primarily to rectify the wrong done,[3] or to shield the wrongdoer from the consequences of his default,[4] or through fear of suit or exposure on account of a threat real or imagined [5] by one of the parties interested.[6] The first of the English decisions [7] however went on the broader ground that such a transaction as this was not within the general purpose of statutes in bankruptcy.

At first we may be inclined to sympathize with the result reached in the English cases if we feel that *cestuis que trustent* deserve greater protection in the hands of the law than ordinary creditors. Nevertheless under the decisions construing our bankrupt law the conclusion in the American case is at least logical, if not inevitable.

From section 60a, such a transfer as will enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class is a preference. It is a voidable preference if the creditor shall have had reasonable cause to believe

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[1] In this case the bankrupt, a testatmentary trustee had disposed of some of the securities which should have been in his possession. The surety in his bond discovered this fact and persuaded him to replace these with securities of his own. At the time he was to his own knowledge insolvent and within four months was adjudicated a bankrupt. The trustee in bankruptcy recovered these securities from the trustees on the ground of unlawful preference.

[2] Under the American Act the preference must be voluntary, but although intent to prefer is requisite to constitute a preference an act of bankruptcy, it is doubtful at least in the case of preferences which may be avoided by the trustee. See Remington on Bankruptcy § 1405.

[3] *Ex parte* Stubbins [1881], 17 Ch. D. 58.
Ex parte Dyer [1901], 1 K. B. 710.

[4] Sharp v. Jackson [1899], A. C. 419.

[5] Thompson v. Freeman [1786], 1 T. R. 155.

[6] *Ex parte* Taylor [1886], 18 Q. B. D. 295.

[7] *Ex parte* Stubbins, *supra*.

that it was intended thereby to give a preference.[8] The intent, if indeed it is necessary under the American rule, is found in that entertained by the bankrupt, Shaw, "in his individual capacity, while the reasonable cause to assume the intent, on the part of the preferred creditor, appertained to Shaw as testamentary trustee in that capacity." As to other creditors of the same class, that element is present in the fact that the bankrupt here was testamentary trustee over several other estates in which there were shortages. The court by dictum admits that these various estates may share in the distribution of the bankrupt's estate.[9] It is unnecessary to say whether they are creditors of the same class with his other obligees.

The real difficulty of the case lies in conceiving the bankrupt in his trustee capacity as a creditor. Authority has not agreed upon a definition of the word "creditor."[10] Some have limited its application to those to whom there is an obligation in debt or in contract. Others would extend it to those to whom there is an obligation *ex delicto,* even where not reduced to judgment and where the tort is such as cannot be waived and sued upon in assumpsit, as *e. g.,* seduction or slander. A more troublesome question would be whether it includes obligations enforceable only in equity.

The difficulty of an abstract definition of the word "creditor" should not disturb us in the limited field of bankruptcy for in section 1 of the Act of July 1, 1898, "creditor" is defined to "include anyone who owns any demand or claim provable in bankruptcy." Thus preferences are within the same subject-matter as "claims provable." By section 63a provable debts include those founded upon implied contracts. Section 63b provides too that "unliquidated claims against the bankrupt may be liquidated and proved and allowed against his estate." These sections have been construed to include such torts as may be resolved into an implied contract.[11]

The objection that a breach of trust is an equitable rather than a legal tort, seems never to have been raised.[12] The answer would probably be that bankruptcy proceedings are essentially equitable in their nature and thus could take cognizance of breaches of equitable as well as legal duties. The court here believes that when the trustee committed a breach of his trust there arose an obligation

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[8] Under the Amendment of June 25, 1910, c. 412, 36 Stat. 842, the preference is voidable where there is reasonable cause to believe that the enforcement of the judgment or transfer would effect a preference," apparently doing away with the element of intent. The principal case was pending and thus not affected by this recent amendment.

[9] *Accord:* Keble v. Thompson (1791), 3 B. C. C. 112.
Ex parte Shakeshaft, 3 B. C. C. 197.
Lathrop v. Bampton, 31 Cal. 17.
See also Lewin on Trusts, 11th Ed. 1157.

[10] See Words and Phrases, Tit., "Creditor."

[11] Brown v. United Button Co., 149 Fed. 48.
Tindle v. Birkett, 205 U. S. 183.

[12] Lewin on Trusts at page 1146 and Godefroi on Trusts at page 939.

contractual in nature, to restore the value of the assets embezzled.[18] Trusts involve some of the elements of contract but are of a more transcendent character and include so much more that they may not be reduced to the ordinary elements of contract.

Granted then that the obligation to make good upon a breach of trust is a claim provable in bankruptcy on a par with those of other creditors, it seems to be a logical conclusion that a voluntary transfer to carry out this obligation is within the confines of "voidable preferences," although the transaction does appear at first glance to be outside of the usual contemplation and general purposes of statutes in bankruptcy.

S. L. H.

BOOK ENTRIES.—The case of West Virginia Architects and Builders v. Stewart,[1] held that books of original entry of a contractor and builder kept by a bookkeeper, who, according to an established system or method of transacting the business, records the oral or written reports made to him by one or more persons in the regular course of business, of transactions lying in the personal knowledge of the latter, whether such bookkeeper have personal knowledge of such transaction or not, are admissible in evidence in connection with the testimony of such bookkeeper showing the regularity of the entries therein by him, to prove an account therein, without the evidence of the witnesses having personal knowledge of the transactions, provided the testimony of such witnesses, because of death, interest, incompetency, absence, inconvenience or otherwise be unavailing.

The general rule requires that the entrant must have had personal knowledge of the transaction.[2] Though recognizing its existence, and citing a great many cases which follow it, the Court, relying chiefly on Professor Wigmore's exception, qualifies the rule.

The general principle of testimonial evidence is, that the person whose statement is received as testimony should speak from personal observation or knowledge. This principle does not, however, necessarily exclude all entries made by persons not having personal knowledge of the facts entered. If the element of personal knowledge can somehow be adequately supplied by a third person, it is immaterial that the entrant himself did not have this personal knowledge. Professor Wigmore gives three possible situations:

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[18] Perry on Trusts, 6th Ed. § 843.
Dornford v. Dornford, 12 Vesey 127.
Moons v. De Bernales, 1 Russ. 301.
Smith v. Frost, 70 N. Y. 65.
Snyder v. Parmalee, 80 Vt. 496.
Holderman v. Hood, 70 Kans. 267.

[1] 70 S. E. 113 (1911).

[2] Vinal v. Gilman, 21 W. Va. 301.